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In the Supreme Court of the United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the City and County of San Francisco, *et al.*,
Petitioners,

v.

BOB GEARY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AND ITS CALIFORNIA AFFILIATES, *AMICI CURIAE,* IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AND ITS CALIFORNIA AFFILIATES *AMICI CURIAE,* IN SUPPORT OF RESPONDENTS

The American Civil Liberties Union ("ACLU") and its California affiliates submit this brief as *amici curiae* in support of the judgment of the United States Court of Appeals for the Ninth Circuit, sitting *en banc,* holding that article II, section 6(b) of the California Constitution violates the First Amendment.

Letters from counsel for each of the parties, consenting to the filing of this brief, have been filed with the Clerk of the Court.

INTEREST OF THE *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a non-profit, membership corporation with over 275,000 members throughout the United States. For over 70 years, the ACLU has dedicated itself to upholding and protecting the First Amendment rights of all persons, regardless of their partisan political interests or affiliations. The ACLU Foundation of Northern California, the ACLU Foundation of Southern California, and the ACLU Foundation of San Diego and Imperial Counties are the affiliates of the ACLU in California.

In defense of the fundamental First Amendment right of individuals and associations to engage in political expression, the ACLU has been an active participant in litigation involving government regulation of election campaign speech. The New York Civil Liberties Union, an affiliate of the ACLU, was one of the plaintiffs in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), the landmark challenge to the constitutionality of federal election

laws. The ACLU has participated as *amicus curiae* in *California Medical Association* v. *Federal Election Commission,* 453 U.S. 182 (1981); *Common Cause* v. *Schmitt,* 455 U.S. 129 (1982); *Federal Election Commission* v. *National Conservative Political Action Committee,* 470 U.S. 480 (1985); *Federal Election Commission* v. *Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986); *Meyer* v. *Grant,* 486 U.S. 414 (1988), and other cases raising issues similar to those presented here.

In addition, the ACLU has represented various groups and individuals, of all ideological points of view, whose political advocacy has been prohibited, restricted or inhibited by state election laws. Furthermore, the ACLU has had to defend itself against the unconstitutional application of election laws to its non-partisan activities. See *American Civil Liberties Union* v. *Jennings,* 366 F.Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom. Staats* v. *American Civil Liberties Union,* 422 U.S. 1030 (1975); *Buckley* v. *Valeo,* 519 F.2d 821, 871 (D.C. Cir. 1975) (*en banc*), *aff'd in part and rev'd in part,* 424 U.S. 1 (1976).

Because the ACLU is not a political party, its interest here is not to assert its own free speech rights. Rather, the ACLU seeks to ensure that the five political parties that are qualified in California[1] are not deprived of their right to communicate with their members and with the general public on issues that lie at the core of the First Amendment. The ACLU also seeks to vindicate the rights of its members and of the general public to hear what the parties have to say about candidates for public office.

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[1] These parties are the Republican, the Democratic, the Libertarian, the Peace and Freedom, and the American Independent Party. See Brief for Petitioners at 9 fn. 2 and statutes cited therein.

STATEMENT OF THE CASE

Article II, section 6(b) of the California Constitution, which became effective in June 1986, bans political party endorsements, support or opposition in "nonpartisan" (local and judicial) elections. Respondents, registered voters and members of both Democratic and Republican party committees in San Francisco, sought to have the City and County of San Francisco and the San Francisco Registrar of Voters print official political party and party central committee endorsements in the San Francisco Voters Pamphlets prepared for the elections scheduled for June 2 and November 3, 1987. Joint Appendix (hereafter "JA") at 4-6. When their request was denied, respondents filed this suit challenging the constitutional validity of section 6(b). JA at 2-7.

In April 1988, the District Court found that section 6(b) violated the First and Fourteenth Amendments to the United States Constitution and granted respondents' prayer for injunctive and declaratory relief. JA at 24. The District Court relied on Justice Grodin's concurrence in the California Supreme Court decision in *Unger* v. *Superior Court,* 37 Cal.3d 612 (1984)[2]. JA at 41. (*Unger* found that political parties were not then prohibited from endorsing nonpartisan candidates; Justice Grodin concluded that such a ban would be unconstitutional.) Petitioners appealed and a panel of the Ninth Circuit reversed the District Court, finding that although section 6(b) infringed upon First Amendment rights, it was

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[2] The *Unger* case construed what is now article II, section 6(a) of the California Constitution, which establishes that "All judicial, school, county, and city offices shall be nonpartisan." Hereinafter, it will be referred to as section 6(a).

narrowly tailored to the compelling state interest of impartially administered government. Appendix to Petition for Certiorari (hereinafter "Pet. App.") at A-67.

In 1990, the Ninth Circuit reconsidered the case *en banc* and affirmed the decision of the District Court finding section 6(b) unconstitutional. Pet. App. at A-1. This petition followed.

SUMMARY OF ARGUMENT

Article II, section 6(b) of the California Constitution is a clear infringement of the First Amendment. Political parties have a right to make known their views on public issues and candidates for public office, and the electorate has a right to hear those views. This Court recognized only two years ago in *Eu* v. *San Francisco Democratic Central Committee,* 489 U.S. 214, 223 (1989), that the First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." (Citation omitted.) The Court branded a similar ban on endorsements by parties in primary elections "particularly egregious." *Id.* at 224.

None of the interests advanced by petitioners to support section 6(b)'s Draconian ban on speech are compelling. Petitioners have advanced no recent or realistic threat that parties will dominate local and judicial elections. Recent history, in fact, suggests the contrary. Even if there were some chance that parties could exert a major influence in non-partisan elections, a paternalistic desire to protect the public from its own supposed impressionability does not justify a prohibition on speech.

Likewise, no compelling interest is served by singling out political party endorsements while leaving all other forms

of endorsements untouched. Party affiliation in California has actually decreased over the past few decades. At the same time, the influence of other political organizations—such as political action committees representing trial lawyers, insurance companies, and environmental groups, all of which are left untouched by section 6(b)—has increased many times over. Section 6(b) is thus both overinclusive, for singling out political parties without a showing that they pose any clear and present danger to the electoral process, and underinclusive for leaving untouched many far more powerful forms of influence. Indeed, section 6(b) would even allow party "clubs"—of which the record shows there are many in San Francisco—to flourish in non-partisan elections, while stifling official party committees and the parties themselves.

Petitioners have also failed to show that section 6(b) is necessary to serve the independence of the judiciary. Judges have consistently shown the ability to remain free of partisan influences and to vote against their "benefactors." Judges have been independent from such pressures in California. They can and will remain so regardless of whether political parties are allowed to endorse or oppose them.

There is no record evidence supporting the dire warnings raised by petitioners. To the extent there is any evidence on the point, it supports respondents and not petitioners. Despite the absence of any explicit ban on party endorsements in judicial elections until 1986, the parties have played no significant role in any California judicial elections this century. In 1986, however—the first judicial election in which .there *was* a clear ban on party activity—California witnessed its most heated and controversial judicial election in history, and for the first time incumbent justices were not confirmed. This election was followed by a very quiet 1990

election in which—despite the fact that parties were allowed to endorse by virtue of the Ninth Circuit's *en banc* decision in this case—parties played no real role.

A judge is unlikely to be perceived as ideological merely because a party endorses or opposes him or her. Parties are diverse collections of people generally embracing a wide spectrum of views. The perception of impropriety, if not impropriety itself, is far more likely to arise with support or opposition from special interest groups or economic entities.

Finally, section 6(b) is manifestly not the least restrictive way of keeping the judiciary independent. Any number of other alternatives—tougher recusal standards, lifetime tenure, or changing the present system of elected judges, for instance—can address the perceived problem without prohibiting political speech. Moreover, California has failed to show that its provisions for peremptory disqualification of trial judges, pro tempore appellate judges, and section 6(a) itself, providing for nonpartisan elections, are inadequate ways to keep the judiciary independent and impartial.

ARGUMENT

This case is about pure political speech, and a state's paternalistic attempt to muzzle it. At stake is whether voters have a right to hear what political parties and their members have to say about local government and the judiciary. Here—as in the cognate case of *Eu* v. *San Francisco Democratic Committee,* 489 U.S. 214, 228 (1989)—the state seeks to squelch speech with naught but its own claim to know best how to help its citizens make wise decisions. The same interests are at stake, and the same unsupported justifications

are advanced to silence speech, as in *Eu.* This Court should reach the same result and affirm the Ninth Circuit's *en banc* decision.

I. ARTICLE II, SECTION 6(b) IS A CLEAR INFRINGEMENT ON THE FREE SPEECH AND FREE ASSOCIATION RIGHTS OF POLITICAL PARTIES AND THEIR ADHERENTS.

There is no question that article II, section 6(b) infringes on First Amendment rights. As the Court observed only two years ago: "A State's broad power to regulate the time, place, and manner of elections 'does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens.'" *Eu,* 489 U.S. at 222, citing *Tashjian* v. *Republican Party of Connecticut,* 479 U.S. 208, 217 (1986).

By depriving political parties of their right to make endorsements, section 6(b) not only limits but "suffocates" their rights of free speech and association. *Eu,* 489 U.S. at 224. The blanket prohibition on speech contained in section 6(b) is thus a classic prior restraint—"the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Assn.* v. *Stuart,* 427 U.S. 539, 559 (1976).

Given section 6(b)'s clear infringement on First Amendment rights, it can be justified only if it serves a compelling state interest and is narrowly tailored to serve that interest. *Eu,* 489 U.S. at 222. Section 6(b) fails both tests.

A. SECTION 6(b) SERVES NO COMPELLING STATE INTEREST.

The driving force behind section 6(b)—indeed, the only interest advanced to support it—is pure paternalism. Here, as in *Eu,* "The State's...justification for the ban on party endorsements and statements of opposition is that it is necessary to protect...voters from confusion and undue influence." *Eu,* 489 U.S. at 228.

Such claims are nothing new. Almost 200 years ago, Thomas Jefferson confronted and rejected similar arguments in his first inaugural address: "Sometimes it is said that man cannot be trusted with the government of himself. Can, then, he be trusted with the government of others? or have we found angels in the form of kings to govern him? Let history answer this question."[3] James Madison has also eloquently emphasized the preeminent importance of the public's right to know: "A popular government, without popular information, or the means of acquiring it, is but a prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." (Quoted in *Board of Education* v. *Pico,* 457 U.S. 853, 867 (1982) (plurality opinion).)

This Court has consistently greeted unsupported attempts to protect voters from themselves with the skepticism they deserve. "[A] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism."

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[3] Thomas Jefferson's First Inaugural Address, March 4, 1801, reprinted in *Modern Eloquence* (W.A. Cowie, 1901) at 1257.

Eu, 489 U.S. at 228 (citations omitted).[4]

The state does not deny the paternalistic impulse behind section 6(b); rather it attempts to justify that paternalism by relying on the excesses of early twentieth-century bossism. There are at least two problems with this approach. First, our constitutional system does not accept the equation between speech and corruption. E.g. *Whitney* v. *California,* 274 U.S. 357 (1927) (Brandeis, J., concurring). Second, it ignores petitioners' concession that the political parties in California are weak, and have "traditionally been weak." Brief for Petitioners at 28, citing the former chair of the California Democratic Party, Edmund G. Brown, Jr.'s view that "[f]or the better part of this century, political parties in California have been rendered impotent." *Id.,* fn. 12. Indeed, the percentage of voters affiliated with the two major parties in California has consistently declined over the past 30 years. See Appendix A hereto. In the same period, a greater percentage of voters in the State have declined to state their party affiliation. *Ibid.* See also Epstein, *Political Parties in the American Mold* (University of Wisconsin Press, 1986) at 247-8. In turn, special interest groups—such as powerful business entities and labor unions, environmental groups and others—have exerted increasing influence in elections. There is thus nothing in the record to support the claim that political parties in California are likely to present a great or imminent danger to the public interest. *First National Bank of Boston* v.

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[4] "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748, 770 (1976).

Bellotti, 435 U.S. 765, 792 (1978).[5]

The most powerful demonstration that parties play an insignificant role in nonpartisan and judicial elections has come in the last two judicial confirmation elections. In November 1986—immediately after the voters adopted Proposition 49, and with the ban on party endorsements and support securely in place—supporters and opponents of three California Supreme Court justices spent a record $11 million-plus in the most heated judicial election in the state's history. For the first time ever, three incumbent justices were defeated. *Geary* v. *Renne* (Reinhardt, J., concurring), Pet. App. at A-19. In 1990—when, as a result of the Ninth Circuit's *en banc* decision in this case, the parties were free to endorse or oppose candidates as they saw fit—little or no attention was paid to the judicial election and the incumbents breezed to confirmation with little or no visible support or opposition from the parties. To be sure, other factors may have played key roles in the clamorous 1986 confirmation fight and the

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[5] In San Francisco, for instance, party structure is "'only a thing of paper. There is no cadre of precinct workers except that provided by each candidate, and the candidate also does his own fund raising. There is a [Democratic] central committee, but no one seems to know why its control is important.' The upshot: 'In this context of invisible parties an election is much like the start of those long-distance races where everybody is on his own, eyes straight ahead, and there's a considerable amount of jostling in the pack. Candidates raise their own funds, rarely coalesce with other candidates in a slate, and strive earnestly to reach across party and ethnic lines. With a number of candidates for all offices, running at large with no runoffs (except for mayor, beginning in 1975), the process is symbolized by the local practice of slapping hundreds of election posters on buildings, fences, and poles all over the city. By election day the city is a kaleidoscope of jarring, confusing, and possibly self-defeating posters.'" Mayhew, *Placing Parties in American Politics* (Princeton University Press, 1986) at 187.

quiet 1990 election. But these examples indicate that petitioners' interest in keeping the parties out of local politics was more compelling in 1911 than in 1991—and is hardly compelling enough now to justify such a broad prohibition on speech. *See Geary* v. *Renne* (Reinhardt, J., concurring), Pet. App. at A-11 ["whatever the cause of the problems in municipal government in the early 1900s, today's threat to the integrity of the political process comes not from the Republican or Democratic parties -- or even from the Libertarians -- but rather from the corrupting influence of money in politics"].

In short, as this Court recognized in *Eu,* "The State makes no showing...that voters are unduly influenced by party endorsements. There is no evidence that an endorsement issued by an official party organization carries more weight than one issued by a newspaper or a labor union." 489 U.S. at 228 fn. 18. Voters exercise their own independent judgment. *Ibid.* They have a right to know what various political parties think about candidates for local offices—and they usually have a healthy inclination to ignore the parties and make up their own minds when the curtain closes on the voting booth.[6]

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[6] As this Court observed in *Eu,* party endorsements often exert an undue *lack* of influence on the voters. There are numerous examples of party-endorsed candidates losing in primary elections. *Eu,* 489 U.S. at 228 fn. 18. The trend continued in California in 1990 when the party organizations, freed by the *Eu* decision to endorse in primary elections, picked candidates who lost by substantial margins. *Geary* (Reinhardt, J., concurring), Pet. App. at A-15. As Judge Reinhardt observes, parties who cannot pick a winner in their own primaries are likely to have even less influence in non-partisan races—particularly in local elections where the party central committees, notoriously non-influential bodies, make the endorsements. *Ibid.* Indeed, one need look no further than the parties in

Even if the voters of California were at risk of being affected by partisan speech, this Court's precedents have unswervingly rejected a government's interest in selecting the appropriate voices for voters to hear. "[L]imiting what people may hear is generally suspect, but it is particularly egregious where the State censors the political speech a political party shares with its members." *Eu,* 489 U.S. at 223-4 (citations omitted). Indeed, the Court has consistently declined to use restrictions on speech to protect the intended audience from information, even in the context of commercial speech which lies much farther from the core of the First Amendment than the pure political speech at stake here.[7]

> It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.... What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients.

Virginia Pharmacy Board, 425 U.S. at 770 and 773.

The Court's answer to that question has been clear and unequivocal, especially in the context of electoral politics. Limiting speech because it has the *potential* to be effective is not a compelling interest.[8]

> [T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution protects expression which is eloquent no less than that which is unconvincing. We noted only recently that the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. Moreover, the people in our democracy are entrusted with the

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the present case to determine that allowing parties to endorse in non-partisan elections is likely to have little or no influence. Four of the plaintiffs are members of the San Francisco Republican County Central Committee. JA at 4. However, less than 20 percent of San Francisco's electorate are members of the Republican Party. Appendix B hereto. Furthermore, registering with a particular party is not necessarily tantamount to identifying with it. "In California in 1982, 88 percent of its registrants listed themselves as Republicans or Democrats but only 73 percent of its surveyed voters identified with the major parties, [suggesting that] some voters officially record a party preference that they do not really hold." Epstein, *Political Parties in the American Mold,* at 246.

[7] In *Virginia Pharmacy,* 425 U.S. at 769-770, this Court dismissed the Pharmacy Board's contentions that "unwitting customers" exposed to price information would "choose the low-cost, low-quality service and drive the 'professional' pharmacist out of business.... They will lose respect for the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what."

[8] "In accordance with what we have said on the 'clear and present danger' cases, neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression." *Bridges v. California,* 314 U.S. 252, 273 (1941).

> responsibility for judging and evaluating the relative merits of conflicting arguments.

Bellotti, 435 U.S. at 790-791, citing *Buckley v. Valeo,* 424 U.S. 1 (1976) (internal quotations and other citations omitted). Section 6(b) is fundamentally incompatible with that constitutional tradition.

B. SECTION 6(b) IS NOT NARROWLY TAILORED TO ANY COMPELLING GOVERNMENTAL INTEREST.

Petitioners repeatedly assert that their objective is to "keep judicial, school and local elections nonpartisan." Brief for Petitioners at 31. *See also* Brief for Petitioners at 5, 12. Their argument is fatally flawed for two reasons. First, the goal of nonpartisanship is already assured by section 6(a) of the California Constitution. *See* n.2, *supra.* Indeed, until 1986, California itself apparently did not believe that an explicit ban on party endorsements was necessary to ensure the nonpartisan character of "judicial, school and local elections." At the very least, petitioners must now carry the burden of showing some empirical basis for their change of heart. As indicated earlier, that burden has clearly not been met on this record.

Second, the ban on party endorsements embodied in section 6(b) is both overinclusive and underinclusive. It is overinclusive because it is surely unreasonable to contend that all or even many officials will abandon their sense of the public interest in order to curry favor with the parties that endorse

them in nonpartisan elections.[9] Yet, without such a fit between means and ends, section 6(b) cannot be sustained. As this Court has repeatedly emphasized, "[o]ur recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. 626, 646 (1985). *A fortiori,* would-be regulators must bear a heavier burden when they seek to restrict core political speech.

In this case, there is no claim that a party endorsement is harmful in itself. Rather, it is said that party endorsements are likely to foster an environment in which a judge's vote or mayor's order reflects his or her party's view.[10] Under our constitutional system, however, the speculation that some candidates for nonpartisan elected office will abuse the potential for professional or pecuniary gain from party patronage is an unacceptable basis for regulating speech. Like prohibiting handbilling in order to prevent littering, banning political speech in order to reduce the opportunity for bossism is inconsistent with the First Amendment. *See Schneider* v. *Irvington,* 308 U.S. 147, 162 (1939) (state can achieve its goal

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[9] Even the most partisan of officeholders recognize that they should not trade favors for support. See Mills, *A Disorderly House* (Heyday Books 1987) at 1, quoting Jesse Unruh, the late Speaker of the California Assembly.

[10] "Local government's capacity to address those problems depends upon its ability to attract to public office independent thinkers who are not willing to follow the party line just to be elected." Brief for Petitioners at 17. It goes without saying, by now, that petitioners have adduced no evidence indicating a paucity of independently thinking candidates.

of preventing littering by punishing "those who actually throw papers on the street" rather than adopting the broadbrush approach of banning hand-billing). Thus, section 6(b) is overinclusive.

Section 6(b) falters as well because it is underinclusive: it arbitrarily singles out political parties even though dozens of other political speakers could have the same (or more) effect on voters, candidates, and officeholders as the parties are purported to have. See Supplemental Declarations of Arlo Hale Smith and Terence Faulkner, JA at 17-23, observing that numerous *unofficial* "clubs" use party names and make endorsements. Everyone from the American Trial Lawyers Association to the Socialist Workers' Party to numerous unofficial Democratic and Republican "clubs" endorse, support, and oppose partisan as well as nonpartisan candidates.

Section 6(b) would not change this system. Some organizations use their party affiliation in their title, some do not. Some have more political clout than the national or county political parties and some have less. But like the five qualified political parties that are the subject of section 6(b)'s ban, all of these groups are "political" and all are inextricably involved with elections. Section 6(b) would only affect the most publicly accountable of these groups.

Petitioners assert that the "endorsed candidate receives the benefits of voters' lists, organized party support, slate mailings and other forms of assistance usually associated with partisan elections." Brief for Petitioners at 14. This may be true, but it is by no means limited to support by the "qualified" political parties. As Judges Reinhardt and Kozinski observe in their concurrence below, "[t]oday's judicial elections, for the trial courts at least, are marked by the widespread use

of pseudo-official mailers that contain endorsements of candidates for both partisan and nonpartisan office." Pet. App. at A-23. These unofficial slate mailers "sell space—that is, endorsements—to the highest bidder." *Id.* at A-24. They use the names of political parties and *appear* to be official party endorsements. A ban on official party endorsements would not reach the unofficial mailers, leaving those not officially associated with a party free to sell endorsements while cutting off endorsements by official party committees. It defies common sense to think that "independent local government, and [] impartial justice and [] the appearance of impartial justice" would emanate from a simple ban on endorsements by five parties of excessively varied popularity and political clout. Brief for Petitioners at 14.

The problem with section 6(b) is that it is a total ban[11] on endorsements by political parties but its narrowness allows anyone to circumvent its spirit (thereby misleading the public) by capitalizing on a party's name while not actually representing the views of that party.[12] If the state wishes to deter elected officials from growing accustomed to depending on the kindness of strangers, it will have to do something other than ban the endorsements of only one potential participant.

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[11] "Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *United States* v. *Grace*, 461 U.S. 171, 177 (1983).

[12] For instance, the California Democratic Council is not an official arm of the Democratic Party, while the California State Central Committee is. There is no reason to believe that one carries more weight than the other (since a voter may not know the official status of each) or that one is more likely to improperly influence or attempt to influence a public official.

Petitioners argue that allowing party endorsements will subject candidates to "'litmus tests' of their commitment to party platforms." Brief for Petitioners at 16. However, there is no evidence that (1) such tests inevitably issue from party endorsements, or (2) that litmus tests will not issue in the absence of party endorsements.[13] In any event, the state's anxiety about litmus tests is not a basis for banning party endorsements any more than it would justify a ban on political endorsements by special interest groups that are prominently identified in the public mind with a single issue. Here, as elsewhere in the First Amendment, the answer to speech "is more speech, not enforced silence." *See Whitney* v. *California,* 274 U.S. at 377 (Brandeis, J., concurring).

II. SECTION 6(b) IS UNNECESSARY TO PRESERVE THE INDEPENDENCE OF THE CALIFORNIA JUDICIARY.

The state's contention that section 6(b) is necessary to preserve an independent judiciary—an interest that the ACLU supports—is unpersuasive for an additional reason as well. It underestimates the integrity of judges just as it overestimates the influence of political parties. This Court has consistently, and correctly in our view, rested its First

[13] In California's 1986 judicial election—in which political parties were not allowed to endorse, thanks to Proposition 49—the State's Governor opposed three sitting justices, largely because of their perceived position on capital punishment. *Geary* (Reinhardt, J., concurring), Pet. App. at A-18. The Governor may or may not have imposed a litmus test, and one can debate the propriety of his position. The point is that section 6(b) does not stop prominent partisan officeholders from commenting on the fitness of nonpartisan officials and from influencing the outcome of elections.

Amendment decisions on precisely the opposite assumption. To do otherwise would be "to impute to judges a lack of firmness, wisdom, or honor, which we cannot accept as a major premise." *Bridges* v. *California,* 314 U.S. 252, 273 (1941). As Justice Brennan explained for the Court in *New York Times* v. *Sullivan:*

> Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. This is true even though the utterance contains 'half-truths' and 'misinformation.' Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. If judges are to be treated as 'men of fortitude, able to thrive in a hardy climate,' surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

New York Times v. *Sullivan,* 376 U.S. 254, 272-273 (citations and footnote omitted). If harsh criticism of elected officials and judges cannot be stifled, there is no reason to prohibit support.

Petitioners give far too much credit to political

parties' ability to influence judicial elections, and too little credit to judges' ability to avoid undue influence once on the bench. In fact, judges have consistently shown the ability to remain free of partisan influences and even to vote against the executive who put them on the bench. (See, e.g., *United States* v. *Nixon,* 418 U.S. 683 (1974) [unanimous court rejects President Nixon's claim of executive privilege and forces him to surrender Watergate tapes]; *Lungren* v. *Deukmejian,* 45 Cal.3d 727 (1988) [unanimous court, comprised of five members appointed by Governor Deukmejian, rules against governor's appointee to state post whose confirmation failed in one house of Democratic-controlled Legislature].)

If the judiciary in California were truly unable to dispense impartial justice after having to suffer the slings and arrows of electoral politics, petitioners should have been able to point to some actual instances of corruption—but they have not. *Geary* (Reinhardt, J., concurring), Pet. App. at A-15. And if the electoral system could not produce an impartial judiciary, the remedy would be to have appointive judges. Having provided for an elected judiciary, however, California is in no position to silence those who would participate in those elections. "The State of California cannot have it both ways. If it wants to elect its judges, it cannot deprive its citizens of a full and robust election debate. It cannot forbid speech by persons or groups who wish to make their views, support, or endorsements known. Nor can it complain if the citizens wish to make their electoral judgments based in part on recommendations made by political parties." *Geary* (Reinhardt, J., concurring), Pet. App. at A-25.

Petitioners have simply presented no evidence whatsoever that rampant bossism will enshroud the State should the Ninth Circuit's decision be affirmed. As this Court

held in a somewhat different context, "If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration." *Bellotti,* 435 U.S. at 789. Here, as in *Bellotti,* no evidence supports petitioners' parade of horribles.

Thus, the Court has viewed with skepticism the claim that a state's legitimate interest in promoting professional ethics can be achieved by a prophylactic ban on speech. Accordingly, the Court has consistently rejected petitioners' paternalistic reasoning both because the challenged regulations that infringe on the First Amendment do not actually achieve the asserted goals and because they violate the principal value of the First Amendment, which is to increase rather than restrain the flow of information.

> In both *Bates*[14] and *Virginia Pharmacy Board,* the Court concluded that an advertising ban could not be imposed to protect the ethical or performance standards of a profession. The Court noted in *Virginia Pharmacy Board* that '[t]he advertising ban does not directly affect professional standards one way or the other.' 425 U.S. at 769. In *Bates,* the Court overturned an advertising prohibition that was designed to protect the 'quality' of a lawyer's work. 'Restraints on advertising ...are an ineffective way of

[14] *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977).

deterring shoddy work.' 433 U.S. at 378.

Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 564-5 (1980).

As this Court has recognized, "[a]n attorney who is inclined to cut quality will do so regardless of the rule on advertising." *Bates,* 433 U.S. at 378.[15] Similarly, an officeholder who is susceptible to improper influences is unlikely to be redeemed by a ban on party endorsements. In either case, the First Amendment will not allow an abridgement of speech in order to protect a professional, or a politician, from temptation.

Likewise, speech cannot be prohibited to avoid the appearance of outside influence on the judicial process. In *United States* v. *Grace,* 461 U.S. 171, 183 (1983), the Court struck down a total ban on communicative conduct on the sidewalks surrounding the Supreme Court. The Court did not "discount the importance of this proffered purpose" of the ban -- to avoid the appearance that this Court is subject to outside influence -- but nevertheless held that a ban on sidewalk demonstrations outside the Court was not justified and violated the First Amendment. *Ibid.* The same result follows here—the proffered purpose of section 6(b), to avoid the "appearance" of improper outside influence, does not justify a complete ban on parties' political speech.

Lastly, section 6(b) cannot stand because there are

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[15] See also *Virginia Pharmacy Board,* 425 U.S. at 769: "The advertising ban [affects professional standards] only through the reactions it is assumed people will have to the free flow of drug price information. There is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined. That pharmacist is likely to cut corners in any event."

alternatives—some currently in existence—which are far less restrictive of speech. If properly modified or designed, such provisions could more precisely target the perceived problems of undue influence on the judiciary by special interest groups. In particular, California has ample provisions for recusal and for substitution of judges by judges pro tempore, both at trial and appellate levels. These provisions can solve the problems of undue influence and the appearance of impropriety or bias.

For instance, the California Supreme Court has authority to act even if it is made up *entirely* of lower appellate court judges. See *Mosk* v. *Superior Court,* 25 Cal. 3d 474, 480 (1979) (court "composed of all assigned judges pro tempore" finding that it does have constitutional authority to act, ruling against Associate Justice Stanley Mosk on that question). Judges on that court commonly step down from cases in which their impartiality could be questioned.

Likewise, California Code of Civil Procedure section 170 requires trial court judges to disqualify themselves in certain instances, including where the judge has a financial interest in the subject matter of the proceeding or in a party to the proceeding. Cal. Code Civ. Proc. section 170.1(a)(3). Those who seek to diminish the possibility that a sitting judge will be influenced by improper considerations should focus their efforts on this section of the Code, and attack the problem directly, rather than on an unnecessarily expansive and indirect constitutional provision which deters political speech rather than promoting impartiality.

Such alternatives as these demonstrate that section 6(b) is "legislation not reasonably restricted to the evil with which it is said to deal." *Michigan* v. *Butler,* 352 U.S. 380, 383 (1957). It "burns down the house to roast the pig." *Ibid.* Section 6(b) simply fails to pass constitutional muster.

CONCLUSION

Section 6(b) works a complete ban on political party speech in important local and judicial elections, without serving a compelling state interest. It runs afoul of the First Amendment and of this Court's precedents, including the recent *Eu* decision. The judgment of the *en banc* court below should be affirmed.

DATED: April 3, 1991

COOPER, WHITE & COOPER
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By _____
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Appendix A

PERCENTAGE OF ELIGIBLE VOTERS IN CALIFORNIA

Year	Democrats	Republicans	Other
1922	13%	40%	10%
1930	13%	47%	4%
1940	57%	35%	4%
1950	47%	30%	4%
1960	45%	31%	3%
1970	39%	28%	4%
1972	44%	29%	6%
1974	41%	26%	5%
1976	40%	24%	6%
1978	39%	23%	6%
1980	39%	26%	9%
1982	38%	25%	9%
1984	41%	29%	9%
1986	37%	28%	8%
1988	37%	28%	8%
1990	35%	27%	8%

PERCENTAGE OF REGISTERED VOTERS IN CALIFORNIA

Year	Democrats	Republicans	Other
1922	21%	63%	16%
1930	20%	73%	7%
1940	60%	36%	4%
1950	58%	37%	5%
1960	58%	39%	3%
1970	55%	40%	5%
1972	56%	37%	7%
1974	57%	36%	7%
1976	57%	35%	8%
1978	57%	34%	9%
1980	53%	35%	12%
1982	53%	35%	12%
1984	52%	36%	11%
1986	51%	38%	11%
1988	50%	39%	11%
1990	50%	39%	11%

Source: "Comparative Voter Registration and Participation in Statewide General Elections—1910-1990" from the California Secretary of State, Elections Division.

NUMBER AND PERCENTAGE OF REGISTERED VOTERS IN SAN FRANCISCO

Party	Number	% of Total
Democrats	263,202	64.86%
Republicans	75,606	18.63%
Other:		
American Independent	4,208	1.04%
Peace & Freedom	2,980	.73%
Libertarian	2,009	.50%
Non-Partisan *	56,342	13.89%
Misc.	1,429	.35%
	405,766	100.00%

* Declined to state party

Source: San Francisco Registrar of Voters, 3/91